

SOUTH AFRICA / JUDGMENT

## S v Jawa (A698/2007) [2008] ZAWCHC 202 (16 May 2008) [2008] ZAWCHC 202

COURT

Western Cape High Court, Cape Town

BEFORE

Cleaver, Brusser

CASE / FILE NUMBER

A698/2007

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### JUDGMENT

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A698/2007

DATE: 16 MAY 2008

In the matter between:

THE STATE

versus

MAWETHU JAVU (JAWA)

CLEAVER, J:

The Accused was convicted on the 26 September 2006 in the Regional Court of Malmesbury together with a second accused of the crime of robbery, the State having alleged that aggravating circumstances were present and that in consequence the provisions of the minimum sentence legislation namely Act 105 of 1997 were applicable.

The Accused was legally represented, pleaded not guilty and was duly found guilty and sentenced to a term of imprisonment of 12 years. He now comes on appeal with the consent of this court against both the conviction and the sentence.

The evidence for the State was relatively brief. Mrs Sasson, an employee of a business in Malmesbury testified that she and a fellow worker, Mrs Fredericks, were confronted by two black gentlemen who appeared on the scene. They were threatened with a firearm held by one of them and robbed of cash of about R3 000. It is not in dispute that the assailants arrived in a blue Volkswagen motor vehicle which had yellow number plates.

The evidence for the State was principally that of Teresa Masoko. She was the girlfriend of the owner of the Volkswagen motor vehicle and testified that her boyfriend had told her that the appellant, Accused No. 2, in the court a quo would be fetching the motor vehicle in order to repair it. The Accused duly arrived at her house at about 8 o'clock on the day in question, collected the keys from her and returned the vehicle at about 12 o'clock.

In cross-examination, it was put to her that the Accused had brought the vehicle back sometime between 11.15 and 11.30 but she denied that saying that she remembered that it was about 12 o'clock. That was the time when toddlers came home from school and can she remember the toddlers were on their way home when the accused arrived. More importantly, she testified that when the Accused arrived driving the motor vehicle, he did so at great speed. He brought the vehicle to a stop, jumped out of it, threw the keys of the vehicle to her and then ran off in the company of two other men who were with him in the motor vehicle. Shortly thereafter the police arrived. She indicated to them the name of the Accused who she knew and the Accused was arrested shortly thereafter.

The Accused confirms that he collected the motor vehicle that morning. He says that he was actually going to collect some ceiling boards from a friend of his but that he found this friend in the village and ascertained from him that he would not be able to collect the ceiling boards that morning. He said he then whiled away some time and came across an acquaintance by the name of Siya who asked him whether he was going to the location as he wished to have a lift with him. He says he wasn't in a hurry although Siya was apparently in more of a hurry. With Siya at that stage was the other accused in the trial. For some reason or another, he left Siya and the other accused because a lady unknown to him had had some difficulty with a cell phone. It wasn't entirely clear from the record what the difficulty was, but he accompanied her, he says, to Pick 'n Pay where the problem with the cell phone was resolved. However, the others - no sorry, I've said that he left Siya and the other Accused; it was not the other Accused, it was another man apparently from Tulbagh. For reasons which are not clear, he says he left the keys of the vehicle with Siya and the other man and was surprised when he returned to find that the vehicle was not there. He estimates that he was at Pick 'n Pay at about 11 o'clock and that he waited about 15 to 20 minutes before they returned with his vehicle. He then drove the vehicle

towards the location. On the way the man from Tulbagh, whom he did not know, got off and they then came across Accused No. 2 at the container which is apparently used for telephones. Accused No. 2 then got into the vehicle and after Siya had given him some money to put petrol in, they drove back to the house where he had picked up the vehicle and dropped it in the normal course and then walked off as if nothing had happened. He testified further that he had arranged to go to the house of Accused No. 2 because the latter was going to dub some CDs for him but that's

not particularly important.

The defence put up is in effect an alibi, namely that the Accused was not at the scene at all and it is trite that in assessing an alibi, a court is required to consider the evidence of all the witnesses as a whole and to establish that whether in the light of that evidence the version of the Accused can reasonably possibly be true. In the present case there is no challenge to the evidence of Mrs Basson and in that regard it is important that she identified Accused No. 2 who was also in the vehicle when it returned to its home. She had identified Accused No. 2 at an identity parade and as far as the evidence before the Magistrate is concerned, Accused No. 2 was therefore part of one of the two assailants.

The established facts are that Mrs Basson testified that two persons, one of whom was Accused No. 2, had arrived in a blue Citi Golf and held them up and it is common cause that the Appellant and Accused No. 2 were in the car when it arrived back at Teresa's residence.

The Regional Magistrate was impressed by the evidence given by Teresa Masoko. In his judgment he said that she did not put a foot wrong, that she was candid and convincing, that she was transparent and truthful. In legal parlance, this means that he found her to be credible and honest. It is important that her evidence was to the effect that the car returned at 12 or shortly thereafter which is very shortly after the robbery was committed. It also must be accepted that the Accused arrived in a rush, threw the keys to Teresa and that he and the other occupants then ran away.

The Accused presented an elaborate story to indicate that the time in question the car was not in his possession. Two aspects are particularly unlikely and improbable. Firstly, why would he go off with a perfect stranger to help her sort out something with a cell phone? And, importantly and most importantly, why would he hand the keys of the vehicle to the two men who he says were with him? There was no reason at all for him to give them the keys. He says that they simply asked whether they could sit in the vehicle because the weather was not favourable.

The Regional Magistrate found the Appellant to be a poor witness and said of him:

"He was argumentative, evasive and hesitant. Sometimes he refused to answer certain questions. It is clear from the evidence of Accused No. 1 that he wanted to tell or show the Court that he was not in possession of the motor vehicle from around 11 until he got the motor vehicle at around twenty past eleven and then drove home."

Added to this, is that in cross-examination of Teresa Moseka it was put to her that he returned the vehicle between 11.15 and 11.30 which clearly could not have been the case. There are also other discrepancies between his evidence and that of Accused No. 2 as highlighted by the Magistrate, but it is not necessary for me to point that out.

In effect, the State relies on the evidence of a single witness and the Regional Magistrate applied the necessary caution in dealing with her evidence, it is also true that the State relies on circumstantial evidence and the test here is that from the admitted facts the conclusion which the State seeks to draw must be the only reasonable conclusion. It is important that the car was

returned very shortly after Mrs Basson said that she was robbed. A car was identified by her as being used by the two persons who committed the robbery and was returned at great speed. In my view, the Magistrate was perfectly correct in convicting the Accused and the appeal against the conviction must fail.

As to the appeal against the sentence, the Magistrate found substantial and compelling circumstances to be present and for that reason did not impose the minimum sentence prescribed by the legislation. For the Appellant to succeed on appeal, he must satisfy the Court that the Magistrate did not exercise his discretion properly in arriving at the sentence of 12 years.

Having regard to the injunction in *State vs Malqas* a well-known decision of the Supreme Court of Appeal, that the minimum sentence ought normally to be applied, there is, in my view, no reason to conclude that the Magistrate did not apply his discretion properly. In the circumstances, the Appeal against the sentence must also fail.

And then, in the result, the APPEAL AGAINST BOTH THE CONVICTION AND SENTENCE IS REFUSED and the conviction and sentence are confirmed.

CLEAVER,J

I agree.

BRUSSER, AJ

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